THE PERILS OF PARENTHOOD AND OTHER DANGEROUS RELATIONSHIPS UNDER THE WHISTLEBLOWER PROTECTION PROVISION OF THE SARBANES-OXLEY ACT OF 2002

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The Sarbanes-Oxley Act of 2002 ("SOX") represented the Congressional response to the financial disaster that was created by the collapse of Enron in 2001. Included in the Act were attempts to strengthen accounting, auditing, and financial controls to enhance the accuracy and disclosures required under the securities laws in order to better protect the investing public. Among the provisions of SOX are the whistleblower protections for those providing evidence of fraud or who participate in proceedings relating to violations of the antifraud statutes or SEC rules. The focus of this article is the administrative decisions and federal cases involving the identification of the companies subject to the whistleblower protection provision. The Act provides that entities registered under Section 12 or required to file under Section 15(d) of the Securities Exchange Act of 1934 are covered. The issues in these cases center on whether privately held subsidiaries of these entities are also within its scope as well as the meaning of the phrase, "officer, employee, contractor, subcontractor, or agent of a company." Depending on how these issues are decided, the scope of SOX could be greatly expanded beyond that originally contemplated by its drafters.

I. INTRODUCTION

The Sarbanes-Oxley Act of 2002 ("SOX") represented the Congressional response to the financial disaster embodied in the collapse of Enron Corporation in late 2001. Enacted on July 30, 2002, as Public Law 107-204, the Act contained numerous far reaching provisions to address the accounting, auditing, and financial wrongdoings uncovered in subsequent investigations of Enron's demise.[1] Its stated purpose is "[t]o protect investors by improving the accuracy and reliability of corporate disclosures

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[1] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

made pursuant to the securities laws," among others.[2] The Act is composed of eleven titles concerning, for example, creation of a Public Company Accounting Oversight Board,[3] procedures for enhancing auditor independence,[4] rules for heightened corporate responsibility to the public,[5] requirements to increase financial disclosures,[6] and several provisions for new or greater criminal penalties relating to white collar crimes and corporate fraud.[7]

The title of most relevance to this article is Title VIII, entitled the "Corporate and Criminal Fraud Accountability Act of 2002."[8] The primary purpose of this Act was to create and enhance criminal penalties for those defrauding publicly traded securities investors, those destroying evidence, and to protect certain whistleblowers of publicly traded companies.[9]

The whistleblower provision, section 806 of SOX, provides federal protection to employees of publicly traded companies who provide evidence of fraud to federal governmental authorities or their supervisor or who participate in a proceeding relating to a violation of antifraud laws or Securities and Exchange Commission rules.[10]

The whistleblower provision has already generated a flurry of legal commentary.[11] This article, however, focuses on the administrative decisions and federal cases that center around the issue of which companies are subject to this provision. The statute seems to indicate that only those

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[2] *Id.* at Preamble.
[3] *Id.* at §§ 101-109.
[4] *Id.* at §§ 201-209.
[5] *Id.* at §§ 301-308.
[6] *Id.* at §§ 401-409.
[7] SOX at §§ 902-906 and 1102-1107.
[8] Introduced on March 12, 2002, as S. 2010, 107th Cong. (2002), by Senator Patrick Leahy with co-sponsors Senator Thomas Daschle, Senator Richard Durbin, and Senator Thomas Harkin. The Corporate and Criminal Fraud Accountability Act later became part of the larger enactment known as the Sarbanes-Oxley Act of 2002.
[9] S. REP. NO. 107-146, at 1 (2002).
[10] 18 U.S.C. § 1514A(a) (2006).
[11] See, e.g., Ira Rosenstein & Renee Phillips, *Whistleblower Claims Under Sarbanes-Oxley: Which Employers Are Covered?* NYSBA INSIDE, Spring/Summer 2006, at 5; Condon McGlothlen, *The Scope of Whistleblower Protections Under Sarbanes-Oxley: Are Privately Held Companies Covered? - Part II*, THE METRO. CORP. COUNSEL, Dec. 2005, at 36; Condon McGlothlen, *The Scope of Whistleblower Protections Under Sarbanes-Oxley: Are Privately Held Companies Covered? - Part I*, THE METRO. CORP. COUNSEL, Nov. 2005, at 32; Marc I. Steinberg & Seth A. Kaufman, *Minimizing Corporate Liability Exposure When the Whistle Blows in the Post Sarbanes-Oxley Era*, 30 IOWA J. CORP. L. 445 (2005); Stanley L. Goodman, *Sarbanes-Oxley Whistleblower Protection - Two Years Later - What Hath Enron Wrought?*, THE METRO. CORP. COUNSEL, Feb. 2005, at 23; G. Roger King, *New Concern To Publicly Held Companies: Protection of Whistleblowers Under the Sarbanes-Oxley Act*, THE METRO. CORP. COUNSEL, Jan. 2003, Northeast Edition, at 19. In addition, the whistleblower provision of Sarbanes-Oxley has been the subject of numerous state employment law newsletters and law firm newsletters and client advisories.

entities registered under section 12 or required to file under section 15(d) of the Securities Exchange Act of 1934, or their representatives, are covered.[12] As will be seen in the course of the article, however, controversy has arisen over whether or not privately held subsidiaries of such companies are also covered and over what is meant by the phrase "officer, employee, contractor, subcontractor, or agent of a company."[13] Depending on the interpretations employed, the extent of the Sarbanes-Oxley whistleblower protection may vastly exceed the number of companies typically considered as being publicly traded.

The article begins with an examination of the relevant United States Code and Federal Regulation sections and then proceeds to a chronological look at many of the administrative law decisions and the few federal cases on point.[14] A discussion and analysis of the cases follows. A brief conclusion ends the article.

II. THE CODE AND REGULATIONS

What became Title VIII of the Sarbanes-Oxley Act of 2002 started out as section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 ("CCFAA"), introduced by Senator Patrick Leahy on March 12, 2002.[15] CCFAA, designated S. 2010, was proposed as part of the Congressional reaction to the implosion of Enron Corporation in late 2001 and the attendant loss of jobs and millions of dollars in shareholder value. Given the shock waves set off by Enron's collapse, it is not surprising that Congress deemed extensive and rapid federal action necessary.[16]

One of the aspects of the Enron debacle that alarmed Congress was the treatment of employees within Enron and its outside public accounting firm, Arthur Andersen, who tried to bring wrongdoing to light. The most well known of the so-called "whistleblowers" was Enron employee Sherron Watkins. In August 2001, Watkins sought to bring accounting malfeasances to the attention of top Enron management, including the Chairman, Kenneth Lay.[17] Watkins' revelations were not heeded and the company spiraled into bankruptcy by December 2001 amidst an SEC

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[12] 18 U.S.C. § 1514A(a) (Supp. II 2002).

[13] Members of this group are identified as company representatives in the regulations. 29 C.F.R. § 1980.101 (2006) (defining "company representative"). *See infra* Case Law and Discussion and Analysis sections.

[14] The decisions of administrative law judges and the Administrative Review Board were taken from the U.S. Department of Labor Office of Administrative Law Judges website, http://www.oalj.dol.gov (last visited April 17, 2007). Page references in this article are as they appear on the website's display of the cases.

[15] S. 2010, 107th Cong. (2002).

[16] S. REP. NO. 107-146, at 2-8 (2002).

[17] *Id.* at 4.

investigation and some devastating accounting restatements. Enron's stock price dropped from a high of almost $90 per share to under $1.[18]

What particularly incensed Senator Leahy and the co-sponsors of S. 2010 was that rather than taking steps to investigate Watkins' claims and remedy the accounting problems, the senior management of Enron consulted legal counsel about the legality of terminating Watkins. Perhaps even more distressing was legal counsel's opinion that under Texas law Watkins could be fired with impunity.[19] It was the failure of some state laws to protect whistleblowing employees in this situation that provided the impetus for federal whistleblower protection for those reporting financial or accounting improprieties. That protection was written into section 806 of CCFAA, later to become Title VIII of SOX and codified at 18 U.S.C. §1514A. Final regulations pursuant to this section are found at 29 C.F.R. §1980.101 et seq.

Section 1514A provides federal whistleblower protection to employees of any company with securities registered under section 12 of the Securities Exchange Act of 1934, any company that is required to file reports under section 15(d) of that Act, or the company's representative. Such companies are prohibited from discriminating against an employee who provides information or files, or participates in a proceeding relating to violations of securities laws or any federal law involving fraud against shareholders.[20]

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[18] *Id.* at 3.

[19] *Id.* at 5. The Senate Report quotes from an email sent by Enron's outside legal counsel. It says, "'You asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices: 1. Texas law does not currently protect corporate whistleblowers. The supreme court has twice declined to create a cause of action for whistleblowers who are discharged . . .'" *Id.*

[20] Section 1514A in its entirety reads:

> Sec. 1514A. Civil action to protect against retaliation in fraud cases
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> (a) Whistleblower Protection for Employees of Publicly Traded Companies.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
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> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and

Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement Action.—

(1) In general.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) Procedure.—

(A) In general.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) Exception.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) Burdens of proof.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) Statute of limitations.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

A person who believes that such discrimination has occurred may file a complaint with the Occupational Safety and Health Administration ("OSHA"), which conducts an investigation and makes a determination.[21] Any party dissatisfied with the OSHA determination may request a *de novo* review by an administrative law judge ("ALJ").[22] Decisions by an ALJ are subject to timely appeal to the Administrative Review Board ("ARB"), which may or may not decide to hear the appeal.[23] Decisions of the ARB are considered final decisions of the Secretary of Labor and may be appealed to the United States Court of Appeals.[24] If there is not a final decision by the Secretary within 180 days of filing the complaint, the claimant may initiate a lawsuit in District Court.[25]

A complainant must file a complaint within nintey days of the alleged infraction.[26] The remedies available to a successful complainant are those necessary to make them whole, including reinstatement, back pay with interest, attorney fees, litigation costs, and expert witness fees.[27]

> (c) Remedies.—
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> (1) In general.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
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> (2) Compensatory damages.—Relief for any action under paragraph (1) shall include—
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> (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
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> (B) the amount of back pay, with interest; and
>
> (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
>
> (d) Rights Retained by Employee.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

[21] 18 U.S.C. § 1514A (2006) (complaint should be filed with the Secretary of Labor); 29 C.F.R. § 1980.103(c) (2006) (complaint should be filed with OSHA Area Director for the geographical area in which the employee resides or was employed); 67 Fed. Reg. 65,008 (Oct. 22, 2002) (Secretary of Labor delegated responsibility of complaints to OSHA).

[22] 29 C.F.R. §§ 1980.106(a), 1980.107(a), 1980.109(a) (2006).

[23] 29 C.F.R. § 1980.110 (2006).

[24] 29 C.F.R. § 1980.112 (2006).

[25] 18 U.S.C. § 1514A(b)(1)(B) (Supp. II 2002); 29 C.F.R. § 1980.114(a) (2006).

[26] 18 U.S.C. § 1514A(b)(2)(D) (Supp. II 2002); 29 C.F.R. § 1980.103(d) (2006).

[27] 18 U.S.C. § 1514A(c) (Supp. II 2002).

Other portions of the Sarbanes-Oxley Act require that audit committees of public companies establish procedures for receiving complaints regarding accounting matters and for assuring employees of the ability to report confidentially and anonymously concerns about accounting or auditing issues.[28] The Act also criminalizes retaliation against a whistleblower by imposing a fine, imprisonment for up to ten years, or both.[29]

III. THE CASE LAW

Despite its relative newness, the SOX whistleblower provision has generated a significant number of decisions at the ALJ level and a handful at the ARB and district court levels. This section provides a chronological summary of the more noteworthy decisions relating to the issues of parent/subsidiary liability and liability stemming from a contractor, subcontractor, or agent.

A. *Administrative Law Judge Decisions*

1. *Powers v. Pinnacle Airlines, Inc.*[30]

In the first ALJ decision involving a dispute over a covered respondent under SOX, the ALJ dismissed a whistleblower complaint against Pinnacle Airlines on the grounds that it was not a publicly traded company. Pinnacle was a wholly owned subsidiary of NWA, Inc., which, in turn, was a wholly owned subsidiary of Northwest Airlines Corporation. Northwest Airlines was a publicly held company. Powers' claim against Northwest was dismissed for two reasons. First, Powers was not an employee of Northwest and Northwest had not been named as a respondent in the time required by statute. Second, the ALJ held that Northwest could not be held liable for the actions of Pinnacle, Powers' direct employer, because there was no basis for piercing the corporate veil or otherwise recognizing the actions of Pinnacle as being those of Northwest.[31]

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[28] 15 U.S.C. § 78j-1(m)(4)(A)-(B) (2006).

[29] 18 U.S.C. § 1513(e) (2006).

[30] 2003-AIR-00012 (Mar 5, 2003).

[31] *Id.* at 4. Piercing the corporate veil is a judicial device for ignoring the separateness normally attendant between a corporation and its shareholders. The result is that the shareholders become liable for the actions of the corporation, losing their limited liability protection. In the context of a parent/subsidiary relationship a parent may become liable for the actions of a subsidiary if the parent dominates the subsidiary such that the subsidiary is a "mere instrumentality" of the parent. This determination is more art than science. Courts have historically looked at the following factors:

> (1) the presence in both corporations of the same officers or directors; (2) common shareholders; (3) financial support of the subsidiary's operations by the parent; (4) underwriting the

2. *Morefield v. Exelon Services, et al.*[32]

Morefield is an ALJ decision frequently relied upon by those seeking to impose liability on a privately owned subsidiary of a publicly held parent. In this early 2004 decision, the ALJ denied a motion to dismiss filed by respondents Exelon Services, Inc., and Exelon Corporation. Exelon Services was a subsidiary of a subsidiary of Exelon Corporation, which was publicly traded. Morefield was an employee of Exelon Services who claimed he was terminated because of whistleblowing activities against his employer. In this regard, the *Morefield* facts parallel those in *Powers*.

The judge based his decision favoring the complainant largely on his view of the purposes and intent of Sarbanes-Oxley. Subsidiaries like Exelon Services, he reasoned, are an integral part of their publicly traded parents, and the value and performance of the parent are derivatives of the values and performances of all those entities that comprise it.[33] Therefore, SOX whistleblower protection extended to all the components of a publicly traded parent, including privately held subsidiaries. The *Powers* decision was distinguished on the grounds that there the publicly traded parent had not been properly named as a respondent.[34] Importantly, the ALJ said he disagreed with *Powers* to the extent that it implied that veil-piercing facts must be present to afford protection to an employee of a privately held subsidiary.[35]

Morefield remains the broadest reading of the coverage of SOX's whistleblower protections. As will be discussed subsequently, that reading of SOX has been called into question by other decisions.

> incorporation and purchase of all of the capital stock of the subsidiary by the parent corporation; (5) the fact that the subsidiary was organized with a grossly inadequate capital structure; (6) a joint accounting and payroll system; (7) the subsidiary lacks substantial business contact with any save the parent and operates solely with assets conveyed by the parent corporation; (8) in the financial statements of the parent, the subsidiary is referred to as a division of the parent corporation or obligations are assumed to be those of the parent; (9) the property of the subsidiary is used by the parent corporation as its own; (10) the individuals who exercise operating control over the subsidiary exercise it in the interest of the parent; and (11) failure to observe the formal requirements attributable to the operation of a subsidiary.

R. A. Horton, Annotation, *Liability of Corporation for Torts of Subsidiary*, 7 A.L.R. 3d 1343, § 4[a] (1966).

[32] 2004-SOX-0002 (Jan 28, 2004).

[33] *Id.* at 4-5.

[34] *Id.* at 7.

[35] *Id.*

3. *Platone v. Atlantic Coast Airline Holdings, Inc.* [36]

In another decision by the same ALJ that decided *Powers,* an effort to avoid SOX whistleblower liability as an allegedly non-covered employer failed. Although the complainant was an employee of a privately held subsidiary of a publicly traded holding company, the holding company was deemed responsible for its subsidiary's actions because the subsidiary was a "mere instrumentality" of the parent.[37] In reaching this conclusion, the ALJ cited as the basis for her holding the commonality of senior management, the interchangeable use of the parent and subsidiary names, the providing of subsidiary employee benefits by the parent, and a general failure to keep the corporate identities separate in appearances to the SEC, the public, and employees.[38] Obviously, this was a case where veil piercing was used to find liability.

4. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*[39]

Klopfenstein is a peculiar case in that the complainant filed a SOX complaint against neither his privately held direct employer nor the publicly traded parent of his employer's parent. Rather, Klopfenstein filed only against his employer's parent (a subsidiary of the publicly traded entity). No explanation for this was offered in the decision.

The ALJ agreed with the complainant and the decision in *Morefield* that an employee of a private subsidiary of a public company would be within the purview of SOX's whistleblower provisions.[40] The judge even indicated that the likelihood was that Klopfenstein would have been entitled to SOX protection had he named the publicly traded parent as a respondent because of the commonality of management and purpose between parent and subsidiary.[41] Unfortunately for Klopfenstein, however, he had not.

Further, the decision rejects Klopfenstein's arguments that a subsidiary of a public company could be sued without the parent and that the subsidiary could be sued alone as an agent of the publicly traded parent. In key language, the decision states that "if a publicly traded corporation for purposes of this Act is the 'sum of its constituent units' [then the intermediate subsidiary and respondent] was not an 'agent' as referenced in the Act."[42] That language would seem to imply that a subsidiary cannot also be an agent of the parent for purposes of SOX whistleblower liability.

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[36] 2003-SOX-00027 (Apr 30, 2004).
[37] *Id.* at 21.
[38] *Id.* at 20.
[39] 2004-SOX-00011 (July 6, 2004), remanded to ARB No. 04-149 (May 31, 2006).
[40] 2004-SOX-00011 at 11.
[41] *Id.*
[42] *Id.* at 12 (quoting *Morefield*, 2004-SOX-00002 at 6).

In essence, then, the ALJ decision in *Klopfenstein* supports the holding of *Morefield* but results in a different outcome because of the complainant's failure to name the publicly traded parent as a respondent. As discussed below, the ARB remanded this decision two years later.[43]

5. *Gonzalez v. Colonial Bank, et. al* [44]

Once again an ALJ was faced with a decision as to whether or not an employee of a privately held subsidiary of a publicly traded parent was entitled to SOX whistleblower protection. Here, unlike *Klopfenstein*, both the direct employer and the parent were named respondents.

After a brief review of *Morefield*, *Klopfenstein*, and *Powers*, the ALJ concluded that "[a]s the parent company is a respondent in this case and it is determined that Congress intended to provide whistleblower protection to employees of subsidiaries of publicly traded companies, complainant has set forth a cause of action under the Act sufficient to withstand a motion for summary decision."[45] Two items are noteworthy here. First, the ALJ was merely deciding a motion for summary decision, not a final adjudication on the merits. Second, while supportive of *Morefield*, the complainant alleged that the parent and subsidiary were *joint actors* in Gonzalez's termination, a different and more compelling situation than *Morefield.*

6. *Hughart v. Raymond James & Assoc., Inc.* [46]

Hughart does not substantially change the landscape of SOX whistleblower claims but it does add a refinement to the flavor of *Platone* and *Klopfenstein*. Like *Platone* and *Klopfenstein, Hughart* focused on the issue of parent/subsidiary commonality or entwinement. The refinement offered by Hughart, however, is that the parent involvement with the subsidiary must be with regard to "the work environment of, or termination decision about, an employee of its subsidiary company."[47]

In the instant case, while finding some commonality with respect to employer benefits, the ALJ determined that sufficient independence existed between the parent and subsidiary with respect to payroll, funds, supervision, and employee contact so that the subsidiary was not subject to the SOX whistleblower provisions.[48]

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[43] *See infra* notes 103-107 and accompanying text.
[44] 2004-SOX-00039 (Aug 20, 2004).
[45] *Id.* at 4.
[46] 2004-SOX-00009 (Dec 17, 2004).
[47] *Id.* at 44.
[48] *Id.* at 45.

7. *Roulett v. American Capital Access*[49]

While not a major case in the area, *Roulett* is noted for its attempt to argue that a respondent is subject to SOX as a "company representative" of a publicly traded company by virtue of the respondent's purchase and sale of products and services with such a company.[50] The complainant had argued that such interaction made the respondent a "contractor, subcontractor, or agent" of the public company and hence governed by SOX.[51] The ALJ wisely and summarily declined to extend the whistleblower protections so far.[52]

Roulett may also be noteworthy for its holding that a respondent is not a covered employer where it has withdrawn its registration statement under section 12 prior to approval of the statement by the SEC or an exchange.[53] Because of this holding, the complainant made the argument discussed in the previous paragraph.

8. *Mann v. United Space Alliance LLC*[54]

Of interest in *Mann* is the issue of whether SOX protection extends to an employee of a privately held limited liability company which was owned equally by two publicly held companies, Boeing and Lockheed Martin.

Relying on *Morefield, Platone, Klopfenstein*, and *Gonzalez*, the ALJ granted a summary decision to Boeing and Lockheed based on their lack of commonality and control over United Space Alliance (USA).[55] The ALJ determined that USA was distinct from its owners and was not subject to their internal controls (citing *Gonzalez*), nor was it an "inseparable, integral part" of either entity (citing *Morefield*).[56] The reference to *Morefield's* language is curious, as an objective reading of the decision would not conclude that being an "inseparable, integral part" of another entity is a *requirement* for SOX protection. The ALJ in *Morefield* simply stated that subsidiaries were, in fact, inseparable and integral parts of their parent. USA was likewise granted summary judgment as it was not publicly traded nor was it acting as an agent of a publicly traded entity when it allegedly engaged in the prohibited conduct.[57]

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[49] 2004-SOX-00078 (Dec. 22, 2004).
[50] *Id.* at 8-9. A "company representative" is defined in the regulations as "any officer, employee, contractor, subcontractor, or agent of a publicly traded company." 29 C.F.R. § 1980.101 (2006).
[51] 2004-SOX-00078 (Dec. 22, 2004) at 8.
[52] *Id.* at 9.
[53] *Id.* at 8.
[54] 2004-SOX-00015 (Feb 18, 2005).
[55] *Id.* at 9.
[56] *Id.*
[57] *Id.*

9. *Minkina v. Affiliated Physicians Group* [58]

The Complainant in this case sought to argue that her private employer was subject to SOX as an "officer, employee, contractor, subcontractor, or agent" of a publicly traded company.[59] The ALJ however, granted summary decision to Affiliated Physicians finding that the Act implicitly required the officer, etc., to be engaged in the prohibited conduct "*on behalf of*" an otherwise covered employee.[60] No such facts were present here nor was Affiliated Physicians a subsidiary of a publicly traded entity. The ALJ held that "there is nothing in the language of [SOX] or its legislative history that suggests Congress intended to bring the employees of non-public contractors, subcontractors, and agents under the protective aegis of section 806."[61]

10. *Grant v. Dominion East Ohio Gas* [62]

Here the Complainant only named a privately held subsidiary, Dominion East Ohio Gas, as respondent. Complainant did not introduce evidence that its parent, though not named, was publicly traded. [63] In dicta, the ALJ stated that even had the parent been named, and even if the parent were publicly traded, the complainant would need to establish either that the circumstances warranted piercing the corporate veil or that the subsidiary was acting as the agent of the parent.[64] The ALJ cited to *Platone, Morefield* (again wrongly believing that it *requires* that a subsidiary be an integral and inseparable part of the parent), *Klopfenstein, Gonzalez*, and (curiously and without explanation) *Powers*.[65]

11. *Dawkins v. Shell Chemical, Inc.*[66]

Complainant here again failed to name a publicly traded parent as a respondent. The ALJ noted that while an employer of a non-publicly traded subsidiary *could* be covered by SOX (citing *Morefield), there* must be grounds for piercing the corporate veil to do so (citing *Powers* and *Klopfenstein*).[67] No basis for doing so existed in this case and the complaint was dismissed.

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[58] 2005-SOX-00019 (Feb 22, 2005).
[59] 18 U.S.C. § 1514A(a) (Supp. II 2002). *See supra* note 20 and accompanying text.
[60] 2005-SOX-00019 at 6. (emphasis added).
[61] *Id.*
[62] 2004-SOX-00063 (Mar 10, 2005).
[63] *Id.* at 33.
[64] *Id.* at 34.
[65] *Id.* at 34-35.
[66] 2005-SOX-00041 (May 16, 2005).
[67] *Id.* at 4.

12. *Kalkunte v. DVI Financial Services, Inc. & AP Services, LLC*[68]

This case represented something of a twist on the typical SOX whistleblower protection fact pattern, but it nonetheless contains some interesting observations.

The complaining employee in this case was an employee of DVI, a publicly traded company which was going through bankruptcy and dissolution. AP Services, a non-publicly traded limited liability company, contracted with DVI to provide DVI with management services during this process. Pursuant to that contract, employees of AP were placed in management positions with DVI, and one of the AP employees terminated complainant.[69] Complainant sought SOX whistleblower protection against both entities (DVI and AP), likely targeting AP due to the financial destitution of DVI. AP argued, unsuccessfully, that it was not a SOX covered employer.

The crux of the case hinged on the SOX language that indicates that prohibited retaliation extends not only to companies registered under section 12 or filing under section 15(d) of the Securities Exchange Act of 1934 but to "any officer, employee, contractor, subcontractor, or agent of such company."[70] AP argued that the quoted language meant that these entities could only create vicarious liability *for* a publicly traded company.[71] The ALJ rejected that interpretation. Rather, the judge determined that AP was an agent of DVI and thus acquired attendant respondeat superior liability to DVI's employee.[72] Here again it is important to remember that the primary target of the complainant was probably AP Services, not DVI, the publicly traded company that was the complainant's actual employer.

In the course of his opinion the ALJ stated that he found *Morefield* "persuasive"[73] and said that the text of SOX clearly made it applicable to other than companies with registered securities.[74] To support his extension of liability to AP on these facts the ALJ said AP's argument was inconsistent with the language, legislative history, regulations, and case law of SOX but did not elaborate on the assertion.[75] This is in some contrast to the language of *Minkina*, discussed earlier and reiterated in *Stevenson v. Neighborhood House Charter School*,[76] that "there is nothing in the language of [SOX] or its legislative history that suggests that Congress

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[68] 2004-SOX-00056 (July 18, 2005).
[69] *Id.* at 3-5.
[70] 18 U.S.C. § 1514A(a) (Supp. II 2002).
[71] 2004-SOX-00056 at 6, 8.
[72] *Id.* at 6.
[73] *Id.*
[74] *Id.* at 8-9.
[75] *Id.* at 8.
[76] 2005-SOX-00087 (Sep 7, 2005).

intended to bring the employers of non-public contractors, subcontractors and agents under the protective aegis of section 806."[77]

13. *Bothwell v. American Income Life*[78]

Once again, at issue in this case, inter alia, was whether a non-publicly traded subsidiary of a publicly traded parent was subject to the SOX whistleblower provisions. As in other cases, the parent was not named as a respondent in a timely and proper manner. It was undisputed that American Income Life ("AIL") was not a publicly traded company and that it was not an "officer, employee, contractor, subcontractor, or agent" of one.[79] The Complainant sought to make AIL a covered employer strictly based on its status as a subsidiary of a covered employer.

In granting a summary decision dismissing the complaint the ALJ pointed to what he called the "clear statutory language" and legislative history of SOX.[80] He asserted that Congress could have clearly included subsidiaries such as AIL had it wished to do so but did not.[81] He quoted Senator Sarbanes to the effect that the intent of the drafters was to only target registered companies, not "companies who make up the vast majority of companies across the country."[82] To agree with Complainant's view would, the ALJ said, expand the reach of SOX well beyond that intended by Congress.[83]

The decision also noted that even had the publicly traded parent been properly named as a respondent, SOX protections would not have extended to AIL because there was insufficient indication that the parent dominated AIL with respect to employment matters sufficient to pierce the corporate veil.[84]

14. *Brady v. Direct Mail Management, Inc.* [85]

This case reiterated the view that for a non-publicly traded company to be subject to SOX it must be found to have been acting on behalf of an otherwise covered employer or be under the dominion of such an employer with respect to matters of employment.[86] Such was not the case here and respondent's request for summary decision was granted.

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[77] 2005-SOX-00019 at 6.
[78] 2005-SOX-00057 (Sep 19, 2005).
[79] *Id.* at 6.
[80] *Id.*
[81] *Id.*
[82] *Id.* Senator Sarbanes' statement may be found at 148 CONG. REC. S7351 (daily ed. July 25, 2002).
[83] 2005-SOX-00057 at 6.
[84] *Id.* at 8-9.
[85] 2006-SOX-00016 (Jan 5, 2006).
[86] *Id.* at 8.

15. *Goodman v. Decisive Analytics Corp.* [87]

Complainant sought to bring his privately held employer within SOX whistleblower coverage on the grounds that it was a "contractor, subcontractor, or agent" of covered employers.[88] After acknowledging more liberal interpretations of SOX coverage (citing *Gonzalez, Morefield,* and *Klopfenstein*) and the "remedial nature" of SOX, the ALJ nevertheless determined that SOX *only* applied to employees of publicly traded companies and *not* those of their privately held contractors or subcontractors.[89] The decision draws a clear and unqualified line on the extension of SOX whistleblower liability.

16. *Reno v. Westfield Corp., Inc.*[90]

Citing *Goodman* and *Minkina*, the ALJ in this case found a privately held employer not within the scope of SOX whistleblower coverage despite being an alleged contractor of a covered employer.[91] It was necessary, said the ALJ, that the contractor be acting on behalf of the covered employer when engaging in the prohibited conduct.[92] Such facts were not present in the case.

17. *Gale v. World Financial Group*[93]

Complainant in this case sought to bring an eight-level-removed subsidiary of a covered entity within the reach of SOX by alleging it was a "company representative" of the covered entity. In the regulations adopted pursuant to the whistleblower provisions of SOX, "company representative" is the umbrella term used to refer to officers, employees, contractors, subcontractors or agents of a publicly traded company.[94] While acknowledging that the mere existence of a parent/subsidiary relationship was not enough to trigger protection, the ALJ denied the respondent's motion for summary decision to allow the complainant the opportunity to show that respondent was a contractor, subcontractor, or agent of its publicly traded, far removed parent.[95]

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[87] 2006-SOX-00011 (Jan 10, 2006).
[88] *Id.* at 8-9.
[89] *Id.* at 9-10.
[90] 2006-SOX-00030 (Feb 23, 2006).
[91] *Id.* at 4.
[92] *Id* at 3, 4.
[93] 2006-SOX-00043 (June 9, 2006).
[94] 29 C.F.R. § 1980.101 (2006).
[95] 2006-SOX-00043 at 9, 10. This may conflict with some language in the ALJ decision in *Klopfenstein* which seems to imply that a company cannot be both a subsidiary and an agent. *See supra* note 42 and accompanying text.

18. *Johnson v. Mechanics and Farmers Bank* [96]

Complainant in this case survived a motion to dismiss his SOX whistleblower claim against a private subsidiary of a publicly traded parent. The notable aspect of the case is the ALJ's assertion that the issue of subsidiary liability under these circumstances was too unsettled after almost four years of litigation to grant the motion.[97] *Bothwell* and *Powers* were cited as rendering restrictive views of SOX coverage and *Mann* and *Morefield* as representing more expansive ones.[98]

19. *Deutschmann v. Fortis Investments* [99]

The lone respondent in this case, Fortis Investments, was a non-covered subsidiary of a Belgian financial services firm. The complainant had asserted that Fortis was subject to SOX either as a company representative or as a subsidiary of a publicly traded entity or that the parent should be liable through veil piercing.[100] The parent was not named as a respondent. The more significant problem, however, was that the parent was not itself a covered employer under the SOX whistleblower provisions.[101] Therefore, summary decision in favor of Fortis was appropriate and granted.

B. *Administrative Review Board Decisions*

1. *Flake v. New World Pasta Co.*[102]

This early ARB decision is likely notable solely because it was the first ARB decision addressing the issue of SOX whistleblower coverage. The complainant had named a non-public subsidiary as the sole respondent. The Board dismissed the case as neither the subsidiary nor its parent were a publicly traded company.

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[96] 2006-SOX-00019 (June 9, 2006).
[97] *Id.* at 4.
[98] *Id.* at 3-4.
[99] 2006-SOX-00080 (June 14, 2006).
[100] *Id.* at 2.
[101] *Id.* at 3. The parent firm did not have securities registered under section 12, nor was it required to file under section 15(d) of the Securities Exchange Act of 1934 as is required by SOX. The ALJ also noted the First Circuit decision in Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006), which held that SOX whistleblower liability did not extend to companies headquartered outside the United States.
[102] ARB No. 03-126 (Feb 25, 2004).

2. *Klopfenstein v. PCC Flow Technologies Holdings, Inc., et. al.* [103]

On the issue of whether a non-public subsidiary of a publicly traded company is subject to SOX whistleblower coverage, the ARB avoided a decision. *Flake v. New World Pasta Co.* was distinguished as it did not involve a publicly traded parent. Instead, the Board focused on the potential agency relationship between the parent and the respondent subsidiary.[104] It held that it was not necessary under SOX to sue a covered employer if a respondent was a company representative (officer, employee, contractor, subcontractor, or agent) of a covered employer.[105] That question, said the Board, must be resolved by reference to principles of agency law.[106] On remand, that issue needed to be decided by the ALJ, although the Board volunteered that given the common officers between parent and subsidiary and the involvement of the parent in the subsidiary's investigation of complainant, agency likely existed.[107]

C. *U. S. District Court Decision*

In *Brady v. Calyon Securities*,[108] plaintiff had brought several claims including a SOX whistleblower claim against several defendants, none of which was registered nor filed under the Securities Exchange Act of 1934 as required by SOX. Rather, plaintiff argued that they were covered defendants because they were "agents" of publicly traded companies.[109] The District Court rejected the argument.

The Court held that the language in SOX referencing an agent of a publicly traded company meant that the entity acting as agent must be under the direction of a publicly traded company with respect to matters of employment.[110] Plaintiff's theory would extend SOX protection impermissibly. In the Court's words, "Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interests of public companies."[111]

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[103] ARB No. 04-149 (May 31, 2006).
[104] *Id.* at 13.
[105] *Id.*
[106] *Id.* at 14.
[107] *Id.* at 15.
[108] Brady v. Calyon Securities, 406 F. Supp. 2d 307 (S.D.N.Y 2005).
[109] *Id.* at 318.
[110] *Id.*
[111] *Id.*

IV. Discussion and Analysis

Publicly traded companies identified in SOX are understandably concerned about the extent of their liability under the whistleblower provisions. Particularly in some of the early ALJ decisions discussed earlier, there was reason to believe that the class of protected employees may be much larger than perhaps first envisioned.[112] Some of the more recent decisions, however, seem to have retreated from an expanded reading of who is considered a covered employer.[113] At issue is whether section 12 registrants and section 15(d) filers under the Securities Exchange Act of 1934 are also liable for the actions of their privately held subsidiaries or their privately held, "contractors, subcontractors, or agents."

As indicated in the case discussion of *Morefield*, that decision contains the most expansive reading of SOX whistleblower coverage.[114] It seems to take the view that all subsidiary actions are attributable to the parent simply because they are a constituent part of the parent.[115] The ALJ in that case viewed his reading as consistent with the purpose and intent of SOX.[116] Additionally, the *Morefield* decision states that facts sufficient to pierce the corporate veil are not necessary to trigger parent liability.[117] *Morefield* does not discuss the issue of liability through contractors, subcontractors, or agents.

Morefield is an overextension of SOX coverage and the ARB would be wise to take the opportunity to say so as soon as an appropriate case comes onto its docket. There is no indication in the language of the statute, regulations, or legislative history that suggests that Congress intended to abrogate the traditional common law rules of parent/subsidiary liability. While Congress was certainly desirous of mitigating the "vagaries and patchwork"[118] of state whistleblower protection laws, even the title of §1514A(a) of the United States Code, which was added by SOX, is designated, "Whistleblower Protection for Employees of *Publicly Traded Companies*."[119] Comments of Senators Sarbanes and Leahy repeat this

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[112] *See, e.g.*, Morefield v. Exelon Services, Inc., 2004-SOX-00002 (January 28, 2004); Gonzalez v. Colonial Bank, 2004-SOX-00039 (August 20, 2004); Kalkunte v. DVI Financial Services, Inc., 2004-SOX-00041 (May 16, 2005).

[113] *See, e.g.*, Bothwell v. American Income Life, 2005-SOX-00057 (September 19, 2005); Goodman v. Decisive Analytics, Corp., 2006-SOX-00011 (January 10, 2006); Reno v. Westfield corp., Inc., 2006-SOX-00030 (February 23, 2006).

[114] *See supra* notes 32-35 and accompanying text.

[115] *Morefield*, 2004-SOX-00002 (January 28, 2004) at 5-6, 8.

[116] *Id.* at 5-6.

[117] *Id.* at 7.

[118] *See* S. REP. NO.107-146 at 13 (2002); 148 CONG. REC. S7421 (daily ed. July 26, 2002).

[119] 18 U.S.C. § 1514A(a) (Supp. II 2002). (emphasis added).

language.[120] The Code of Federal Regulations defines a "company" under the Act as one filing under sections 12 or 15(d) of the Securities Exchange Act of 1934.[121] Several of the ALJ decisions discussed above affirm this view.[122]

On the other hand, one should assume that traditional common law views of veil piercing will be utilized in SOX whistleblower cases.[123] Thus, if a parent company disrespects the separateness and independence of its subsidiaries and treats the subsidiary as a mere agent or instrumentality, it should expect that courts and ALJ's applying SOX protections will likewise disregard the separateness of the entities and attribute the actions of the subsidiary to a publicly traded parent.[124]

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[120] 148 CONG. REC. S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes); 148 CONG. REC. S7421 (daily ed. July 26, 2002) (statement of Sen. Leahy).

[121] 29 C.F.R. § 1980.101 (2006).

[122] *See, e.g.*, Bothwell v. American Income Life, 2005-SOX-00057 at 6 (Sept. 19, 2005) ("To include non-publicly traded subsidiary as a 'company' merely because it has a publicly traded parent, would widen the scope of the Act beyond the intentions of Congress."); Andrews and Barron v. ING North American Insurance Corporation, 2005-SOX-00050 (Feb 17, 2006) at 5 ("[N]either the statutory language of the Act nor its legislative history suggests Congress intended to include alone a non-publicly traded subsidiary of a publicly traded parent company as a covered employer.").

[123] The United States Supreme Court recently addressed the issue of the liability of a parent corporation for the actions of a subsidiary in U. S. v. Bestfoods, 524 U.S. 51 (1998). At issue in that case was a parent's liability for its subsidiary under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). In the course of the opinion for a unanimous Court, Justice Souter stated, "CERCLA is thus like many other congressional enactments in giving no indication 'that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based on a federal statute.'" (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979)). Justice Souter also favorably quoted from U.S. v. Texas, 507 U.S. 529, 534 (1993), that "in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." Bestfoods, 524 U.S. at 63. The same principles are true under Sarbanes-Oxley as to the general common law respect for the separateness of parent and subsidiary corporations and the common law rules with respect to piercing the corporate veil.

[124] U.S. v. Bestfoods, 524 U.S. 51, 62-63 (1998) (quoting Chicago, M. & St. P.R. Co. v. Minneapolis Civic and Commerce Assn., 247 U.S. 490, 501 (1918)); Powers v. Pinnacle Airlines, 2003-AIR-00012 (Mar. 5, 2003); Platone v. Atlantic Coast Airline Holdings, Inc., 2003-SOX-00027 (Apr. 30, 2004); Klopfenstein v. PCC Flow Technologies Holdings, Inc., 2004-SOX-00011 (Jul. 6, 2004); Hughart v. Raymond James & Assoc., 2004-SOX-00009 (Dec. 17, 2004); Grant v. Dominion Ohio Gas, 2004-SOX-00063 (Mar. 10, 2005); Dawkins v. Shell Chemical, Inc., 2005-SOX-00041 (May 16, 2005); Bothwell v. American Income Life, 2005-SOX-00057 (Sept. 19, 2005); Deutschmann v. Fortis Investments, 2006-SOX-00080 (Jun. 14, 2006). Three quarters of a century ago, then-professor William O. Douglas co-authored a seminal work on parent/subsidiary liability issues. The advice given in that piece for maintaining separate legal identities and avoiding liability attribution is still sound today. Douglas and Shanks counseled as follows:

Situations where it is alleged that a privately held entity is acting as a contractor, subcontractor, or agent are potentially more problematic because unlike subsidiaries the statute specifically refers to them. These cases require a common sense reading of the legislation and consideration of the legislative history. Given that Congress was generally targeting the employees of publicly traded companies for protection, one meaning of the phrase "or any officer, employee, contractor, subcontractor, or agent of such company" would be that a publicly traded company cannot utilize any of the mentioned actors to accomplish the prohibited treatment. As stated in *Minkina,*[125] *Goodman,*[126] and *Reno,*[127] the language means that those

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> The observance of the following four standards will keep the business units from being treated as assimilated: (1) A separate financial unit should be set up and maintained. That unit should be sufficiently financed so as to carry the normal strains upon it. The risks attendant on the conduct of a business of that type can roughly be averaged and that average met. (2) The day to day business of the two units should be kept separate. Normally each process can be tagged so as to identify it with the activity of one unit or with that of the other. Occasionally such tagging will be difficult in a case where the two businesses are merely units in a line of production. But such separation as the technology of the business permits should be sufficient. And in addition the financial and business records of the two units should be separately kept. (3) The formal barriers between the two management structures should be maintained. The ritual of separate meetings should be religiously observed. The activities of the individuals serving on the two boards can be tagged so that the individuals *qua* directors of the subsidiary can always be distinguished from the same individuals *qua* directors of the parent. Such tagging is not pure fiction. It draws the line that keeps the dual capacities separate and distinct. It conforms to the habit of thought which accepts the fact of dual capacity but which demands a separation of conduct so that each act may be clearly categorized. Separate meetings of the boards are sufficient. The same problem arises in connection with the officers. And the same solution suggests itself; a man may not be indiscriminately one officer or another. The observance of the niceties of business efficiency are normally sufficient. Such demands are not exacting. They merely suffice to keep the record of the business affairs of the two units from becoming hopelessly intermingled. (4) The two units should not be represented as being one unit. Those with whom they come in contact should be kept sufficiently informed of their separate identities.
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> Conformity with the above standards is all that normally could be required of two units so closely connected.

William Douglas and Carrol Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 196-97 (1929).

[125] 2005-SOX-00019 (February 22, 2005) at 6. ("[T]his language simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer.").

persons or entities can create liability for a section 12 or section 15(d) reporting company when they engage in prohibited conduct *on behalf of* the publicly traded company. The language should also mean that a privately held employer can be liable for prohibited treatment of *its* employees who have reported infractions *with respect to* a publicly traded company. For example, an attorney in a law firm that represents a publicly traded company who reports financial wrongdoing by the company and is subsequently fired by the firm should be a protected employee with a valid SOX claim against the law firm. Such an interpretation is evidenced in the Whistleblower Investigations Manual of OSHA. After citing the language of the statute the Manual says that ". . . an employee of an otherwise non-covered employer (e.g., a small accounting firm) that is a contractor of a covered company who provides information to the SEC regarding a violation of SEC regulations . . . would be protected from subsequent retaliation."[128] This may be a broader scope of liability than OSHA expressed in its responses to public comments on the proposed regulations under section 806.[129] It is unreasonable to assert, however, that the intent of this language is to infer that *any* entity that contracts with a publicly traded company is now subject to SOX whistleblower liability with regard to *any* act of whistleblowing.[130] Such a reading would likely cover the vast

[126] 2006-SOX-00011 (January 10, 2006) at 10. (" . . . the terms 'contractor' and 'subcontractor' in the provision reference two of various entities of a publicly traded company that may not adversely affect the terms and conditions of an employee *of a publicly traded company*.") (emphasis in original).

[127] 2006-SOX-30 (February 23, 2006) at 4. (". . . I also interpret Section 1514A(a) to hold contractors of publicly held companies liable only when they act on behalf of the publicly traded company.").

[128] OSHA WHISTLEBLOWER INVESTIGATIONS MANUAL, Chapter 14, Section III, effective August 22, 2003, *available at* www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf.

[129] In response to public comments on the proposed regulations, OSHA stated, "The statute thus protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies." 69 Fed. Reg. 52,104, 52,106 (August 24, 2004). Later in its responses, however, OSHA said that based on ARB decisions under other whistleblower statutes a respondent will be liable for the actions of a contractor or subcontractor where the respondent "acted as an employer with regard to the employee of the contractor or subcontractor, whether by exercising control of the work product or by establishing, modifying, or interfering with the terms, conditions, or privileges of employment." *Id.* at 52,107. That is certainly a sensible view but it is an unduly narrow one if it means that is the *only* scenario where liability may be imposed on a publicly traded respondent with respect to its contractors, subcontractors, or agents. Presumably, it does not.

[130] As was well stated by the ALJ in Roulett v. American Capital Access, 2004-SOX-00078 (December 22, 2004) at 9, "The Act provides specific requirements for its coverage, which I decline to expand to a non-publicly traded company solely because it engages in financial business with publicly traded companies." *See also* Stevenson v. Neighborhood House Charters School, 2005-SOX-00087 (September 7, 2005) at 6 (the

majority of businesses in the country, an outcome not intended by the drafters.[131]

In this regard the *Kalkunte*[132] case presents an interesting situation. It will be recalled that in this case the complainant was seeking to impose liability on a privately held company (AP Services) because of the bankruptcy of the publicly traded one (DVI) that was the complainant's actual employer. In this case, there was no parent/subsidiary relationship. The complainant successfully argued that the privately held entity was liable under SOX because it was an agent of the public company and thus within the language of the statute. Thus, rather than a scenario where the private company creates vicarious liability for the public company, here the situation was reversed. Under principles of agency law, an agent that commits a tort on behalf of a principal is generally liable along with the principal.[133] So, in *Kalkunte*, if AP Services was in fact an agent of DVI with respect to the employment and termination of the complainant, under both the language of the statute and accepted views of agency law, AP is liable. What is puzzling in the opinion is the ALJ's rejection of AP Services' *correct* assertion that the "contractor, subcontractor, agent" language of SOX meant that "publicly traded companies are vicariously liable if their officers, employees, contractors, subcontractors, or agents violate the Act."[134] AP's assertion is, in fact, likely what the drafters meant. What is more, the ALJ could have acknowledged this reading of the relevant language and still reached the same analysis and outcome with respect to the somewhat unusual facts of the case. As it is, this decision as written may create unnecessary concerns that AP Services' argument was incorrect and the door will be opened to an interpretation that makes any company doing business with a publicly traded company subject to SOX liability. That is unfortunate and unwarranted.

V. CONCLUSION

The Sarbanes-Oxley Act of 2002 was a reaction to the scandalous conduct of Enron Corporation and the resulting loss of jobs and millions of dollars of shareholder value. Congress was rightly concerned about the

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ALJ endorsed the language of *Minkina* that SOX's language and history argue against inclusion of non-publicly traded contractors, subcontractors, or agents).

131 As quoted previously, Senator Sarbanes himself said that the whistleblower protections were only intended to apply to employees of publicly traded companies, not those "who make up the vast majority of companies across the country." 148 CONG. REC. S7351 (daily ed. July 25, 2002) (quoted in *Bothwell*, 2005-SOX-00057 (Sep 19, 2005) at 6).

132 2004-SOX-00056 (July 18, 2005).

133 RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

134 2004-SOX-00056 at 8. Referring to AP Services' argument, the ALJ stated, "I find this argument is inconsistent with the 'plain text' of SOX, the legislative intent behind the statute, the regulations, and case law." *Id.*

numerous abuses, obfuscation, and fraud that occurred there, costing many people their jobs, savings, and retirement funds. One component of the Enron failure was the unwillingness to listen to the voices of alarm from within the company and, indeed, the desire on the part of some senior managers to punish and thereby silence those voices. As they have in other areas, Congress sought in Sarbanes-Oxley to provide federal protection to whistleblowers so as to remove them from the uncertainties of the various state laws.[135] But the protections Congress fashioned (reinstatement, back pay, attorney fees, etc.) were limited in their application. They only applied to employees of publicly traded companies (as Enron was) or those acting on their behalf, and they only applied to whistleblowing with respect to certain types of wrongdoing relating to accounting, auditing, securities or shareholder fraud. As much as some would like to broaden that coverage to protect many other whistleblowing employees, Congress did not see fit to do so in this legislation. If Congress determines that more extensive protection is warranted, then it is up to that body to enact appropriate legislation. Such an extension is preferably made by politically accountable representatives rather than unelected judges or administrators.

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[135] Federal whistleblower protection is also provided in the Occupational Health and Safety Act of 1970, 29 U.S.C. § 660 (2006); the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (2006); the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2651 (2006); the International Safety Container Act of 1977, 46 U.S.C. § 1506 (2006); the Safe Drinking Water Act of 1974, 42 U.S.C. § 300j-9(i) (2006); the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1367 (2006); the Toxic Substances Control Act of 1976, 15 U.S.C. § 2622 (2006); the Solid Waste Disposal Act of 1976, 42 U.S.C. § 7001 (2006); the Clean Air Act of 1977, 42 U.S.C. § 7622 (2006); the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610 (2006); the Energy Reorganization Act of 1978, 42 U.S.C. § 5851 (2006); the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (2006); and the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 (2006). All of these whistleblower protection provisions are under the enforcement authority of the Occupational Safety and Health Administration.